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# A Survey of the Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the Untied States (Part 2)

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# A SURVEY OF THE PROPOSALS TO LIMIT OR DENY THE POWER OF JUDICIAL REVIEW BY THE SUPREME COURT OF THE UNITED STATES—II

MAURICE S. CULP\*

## PART III.

### ATTEMPTS TO SECURE MORE POPULAR CONTROL.

The Democrats were not at all pleased with the Federalists in the Supreme Court at the beginning of the 19th century. And on January 13, 1802 on motion to repeal the judiciary act Senator Breckenridge said that the power of the Court to annul the laws of Congress could not exist if the Constitution is to be a practical system. He maintained that it was competent for the department to which a certain power is given to construe that power. He said:

"That it is, in fact more competent to that department to which powers are exclusively confided, to decide upon the proper exercise of those powers than any other department, to which such powers are not instructed, and who are not consequently under such high and responsible obligations for their constitutional exercise; and that, therefore, the legislature would have an equal right to annul the decisions of the Court, founded on their construction of the Constitution as the Court would have to annul the acts of the legislature founded on their construction."<sup>49</sup>

In the same year, Mr. Thomson remarked:

"As long as the office exists the judge holds it during good behavior; he is, then, independent. Being independent, and not having that degree of responsibility attached to his office which is attached to the legislative or to the executive, the powers granted by the Constitution are to be strictly construed: nothing to belief or to implication; nothing to construction; the letter is to determine the extent of the powers, and I conceive it never was intended they should transcend it."<sup>50</sup>

The feeling between the Democrats and Federalists ran high during Jefferson's administration. Justice Chase of the United

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\* See p. 492 for biographical note.

<sup>49</sup> Elliott, *Debates*, vol. 4, 444.

<sup>50</sup> *Annals of Congress*, 7th cong., 1 sess., 552-554.

States Supreme Court had made some remarks about the Jeffersonian party principles during the course of a charge to a grand jury, and he was impeached by the House of Representatives for indiscretion on the bench. The Senate, however, failed to convict.<sup>51</sup> Thus the effort to secure direct removal failed, but the Republicans were not to be stayed in their attempt to curb the "Federalist" Supreme Court. In 1805, after the acquittal of Chase, Representative Randolph sought another method. He introduced the following joint resolution for a constitutional amendment:

"The judges of the Supreme Court and all other courts of the United States, shall be removed by the President, on joint address of both houses of Congress, requesting the same, anything in the Constitution of the United States to the contrary notwithstanding."<sup>52</sup>

The proposal was obviously aimed at a control of the Court and the judiciary in general through the threat of removal by Congress.

And in the following year, 1806, another joint resolution of a similar character was brought forth. The purpose of this proposed amendment was to make the judges more amenable to control. The remarks of one Mr. Smilie will serve to show the spirit behind such proposals. Mr. Smilie observed:<sup>53</sup>

"For my part, I am so sensible that that part of the Constitution which relates to the power of impeachment is a nullity . . . The resolution before you goes to place the judges of the United States on the same independent footing with those of Great Britain. Whether our situation requires that they should stand upon higher ground is a proper subject for discussion. I am rather inclined to think they are not."

Again on January 29, 1811 Representative Wright introduced a joint resolution to amend the Constitution which reads as follows:<sup>54</sup>

"Resolved, That the judges, both of the Supreme and inferior courts, may be removed from office on the joint address of the Senate and House of Representatives of the United States."

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<sup>51</sup> Corwin, E. S., "Establishment of Judicial Review," 9 *Michigan Law Review*, 293-94 (Feb., 1911).

<sup>52</sup> *Annals of Congress*, 8th cong., 2 sess., 121.

<sup>53</sup> *Annals of Congress*, 9th cong., 1 sess., 446.

<sup>54</sup> 11th cong., 3 sess., 836-838.

He justified his resolution thus:<sup>55</sup>

"There are a variety of cases where the exercise of this power may be necessary for the safety of the people, which ought to be the Supreme law. This power, I trust, will never be abused by the American Congress."

The House refused to consider it.

In 1812 there was a similar proposal made in the House.<sup>56</sup> And four years later, Senator Sanford introduced a joint resolution which would have provided for a similar method of removal, although the constitutional majority in Congress to effect removal would have been larger. The measure which follows was read and passed to a second reading:<sup>57</sup>

"The judges of all the courts of the United States shall be subject to removal from office, by the President and both houses of Congress, when, in their opinion, the public good will be promoted by removal; but, in such cases, two-thirds of both houses shall concur with the President in the removal."

The feeling was current among the members of the 17th Congress, in 1822, that the Supreme Court and the judiciary in general were exercising too much power, and efforts were again made to make the Supreme Court more amenable to the popular will. One proposal was to amend the Constitution so as to remove the judges on the address of both houses of Congress.<sup>58</sup> Still another idea was evolved by Representative Lecompte, in 1831, when he moved that the committee on judiciary of the House be instructed to inquire into the expediency of amending the Constitution so that the judges of all federal courts, including the Supreme Court, hold office for a term of years.<sup>59</sup> The House refused to consider the motion. In the following year it again voted down his resolution.<sup>60</sup> Kentucky was one of the western states whose statutes were nullified most by the Supreme Court, and her congressmen were extremely active in attempts to curb the power of that Court. Kentucky's sister state, Ohio, was represented by men who were of the same mind. Mr.

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<sup>55</sup> *Ibid.*

<sup>56</sup> 12th cong., 1 sess., 1317.

<sup>57</sup> 14th cong., 1 sess., 170-171.

<sup>58</sup> 17th cong., 1 sess., 113-114.

<sup>59</sup> 21st cong., 2 sess., 340.

<sup>60</sup> 22nd cong., 1 sess., 1956.

Homer, following Lecompte, was defeated in his effort to secure something of the same character.<sup>61</sup>

Then the scene shifted to the Senate where Senator Tappan, of Ohio, tried to secure a joint resolution for a constitutional amendment to limit the terms of office of the judges of the Supreme and inferior courts. In 1840, 1842 and in 1844 the Senator introduced resolutions to that effect.<sup>62</sup> The purpose of all these resolutions was to limit the term of office of the judges to seven years, so long as they behaved themselves well. Mr. Tappan was satisfied with the judges so long as they were in the vigor of life, but he felt that there had been too many instances where judges have been unfit to discharge their duties. And it would add greatly to our security in the 'enjoyment of life, liberty, and the pursuit of happiness,' and strengthen our government much more, to have the exercise of all power more immediately by the people in the election of all officers (judicial as well as legislative and executive) for short periods of time, and by direct vote of the people. He thought that the judges became indifferent and had no incentive to work well, for their tenure was for life, that they were not secure from personal or private influence, and that they were none the less subject to political influence. The judiciary, after the election of Mr. Jefferson, "ceased to be representative or servant of the people in our courts; but it was the fruitful representative of exploded principles and absolute maxims in government." The consequences of the conservative judiciary working against a liberal executive and legislative body was the interpretation of the Constitution in a way to strengthen and consolidate federal power, whereas a great majority of the people were in favor of a strict construction of the Constitution, and preserving the state government every power not expressly delegated to the general government. He quoted Jefferson:<sup>63</sup>

"The judicial power is the subtle corps of sappers and miners, constantly working underground to undermine the foundation of our confederate fabric . . . Let the future appointment of judges be for four or six years, removable by the President and Senate. This will bring their conduct, at regular periods, under the revision and probation, and may keep them in equipoise between the general and special governments."

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<sup>61</sup> 23rd cong., 2 sess., 942-943.

<sup>62</sup> 26th cong., 1 sess., 514; 27 cong., 3 sess., 41; 28 cong., 1 sess., 304.

<sup>63</sup> 27th cong., 3 sess., app., 147-149.

In 1847 Mr. Breese of Illinois introduced a resolution from the Legislature of Illinois for amending the Constitution so as to provide for a limited tenure for judges.<sup>64</sup> Then a proposal for removal by joint address of a majority of both houses was made by Underwood of Kentucky.<sup>65</sup> And in 1867 Williams of Pennsylvania twice renewed a proposal for the removal of judges by the President on the address of two-thirds of each branch of Congress.<sup>66</sup>

In 1868 Mr. Ashley introduced a resolution to amend the Constitution in order to provide that the judges of all courts hold office for a twenty year period and to retire at the age of seventy.<sup>67</sup> In a speech in support of his resolution he expressed his fear of judicial usurpation and corruption. Referring to the history of judicial usurpation the United States as running over years of judicial "sapping and mining," he characterized the Supreme Court as a thief of jurisdiction, and denounced it for such "destructive" decisions as that in the Dred Scott case.

Following this there were various bills and joint resolutions introduced in Congress to limit the terms of federal judges. In the 53rd Congress Representative Oats introduced a joint resolution to amend section 1 of Article Three as follows:<sup>68</sup>

"The judges, both of the Supreme and inferior courts, appointed after the ratification of this amendment shall hold their offices for a term of ten years . . ."

The Committee on the Judiciary reported favorably to the resolution; the majority report stated that the change would get rid of the incompetent judges and those whose judgments were prejudicial and biased, and those who were partial toward the interests and corporations, and lastly "that the federal judiciary with their life tenure, as Jefferson predicted about the beginning of the present century, have proven to be a corps of sappers and miners to undermine, distort, and partially destroy all the checks and balances of the Constitution and to convert our government into a centralism." This report protested against the support given by the Court to legislation through

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<sup>64</sup> 29th cong., 2 sess., 435.

<sup>65</sup> 30th cong., 2 sess., —; Ames, *Constitutional Amendments*, 151.

<sup>66</sup> 39th cong., 2 sess., 1313; Ames, *Ibid.*, 151 (1849-50).

<sup>67</sup> 40th cong., 3 sess., appendix, 210.

<sup>68</sup> 53rd cong., 2 sess., House Rpt. No. 466 (1893-94).

the taxing, coinage and commerce power, and inveighed against the prostitution and destruction of the states. The resolution was voted down.

Again in 1898 Senator Butler introduced a resolution for an amendment providing that all federal judges should be chosen by the electors qualified to vote for the lower house of Congress. The judges of the circuit and district courts were to be elected from their respective circuits or districts. The Supreme Court was to be composed of from nine to thirteen judges, the country being divided into as many circuits as there were judges on the Supreme bench, and a judge was to be elected from each circuit. In addition the Chief Justice was to be elected by the qualified voters of all the states.<sup>69</sup> Proposals of a similar nature were made in the next Congress.<sup>70</sup>

In the election campaign of 1908 two parties which put national tickets in the field, the Socialist<sup>71</sup> and Independence parties,<sup>72</sup> declared for the popular election of United States judges throughout.

About 1911 there was considerable agitation in the country over the judicial recall, Mr. Roosevelt's name being among those advocating a form of recall of state judges. In that year Senator Owen of Oklahoma introduced a bill for the election and recall of federal judges. The bill read as follows:<sup>73</sup>

"Be it enacted, That any justice of the Supreme Court of the United States and any judge of the circuit or district courts, or of any other court of the United States is subject to recall by a resolution of the Congress of the United States; that upon the passage of a resolution requesting the President of the United States to nominate a successor to such justice, the term of office of any such justice shall be terminated."

The circuit and district judges were to be elected for four year terms. His reasons for making such a drastic proposal are: (1) the federal courts have unlawfully assumed the right to declare acts of Congress unconstitutional; (2) they have undertaken to invade the legislative function of Congress by judicial legislation; (3) they have overridden the rights of states

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<sup>69</sup> 55th cong., 2 sess., 431.

<sup>70</sup> 56th cong., 1 sess., S. J. Res. 47; H. J. Res. 79 (1900).

<sup>71</sup> Kirk Porter, *National Party Platforms* 317.

<sup>72</sup> *Ibid.*, 293.

<sup>73</sup> 62nd cong., 1 sess., S. B. 3112. It is not known how such a process could be constitutional.

by holding their laws unconstitutional, either on the charge that such state laws were unconstitutional or that they were invalid on grounds of policy; (4) the courts have become tyrannical in the case of contempt and injunction suits; and (5) the judiciary is not responsible to the people, either by election or recall. He was of the opinion that the mere enactment of the recall would have such a salutary effect that there would never be any need of its exercise.<sup>74</sup>

The following session Representative Lafferty introduced a joint resolution proposing an amendment to make the federal judiciary elective and subject to recall.<sup>75</sup> He tried again in the next session.<sup>76</sup> And in the four succeeding Congresses proposals were made to elect the federal judges.<sup>77</sup>

In 1920 Senator La Follette proposed an amendment to the Constitution making all judges, of Supreme and inferior courts as well, elective for a term of ten years, during which they were to hold office only on pain of good behavior.<sup>78</sup>

In 1923 Representative Frear, in order to bring the Court "close to the will of the people," proposed an amendment which, with the requirement of unanimity in decisions, would have placed the recall of the judges of the Supreme Court in the hands of two-thirds of Congress.<sup>79</sup> And finally, in 1924, Mr. Dell introduced a resolution for a constitutional amendment which would have made inferior federal judges elective and the Supreme Court judges appointive from the ranks of the inferior court judges, with the discretion in Congress to change the mode of selection and term of office at any time.<sup>80</sup>

## PART IV.

### ATTEMPTS AT THE DENIAL OF JUDICIAL REVIEW.

In the discussions which grew out of the passage of the Alien and Sedition Acts the Kentucky and Virginia Resolutions inveighed against the idea of a "National Sovereignty with a final

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<sup>74</sup> 62nd cong., 1 sess., 3359.

<sup>75</sup> 62nd cong., 2 sess., H. J. Res. 227.

<sup>76</sup> 62nd cong., 3 sess., H. J. Res. 371.

<sup>77</sup> See 63rd cong., sp. sess.; 64th cong., 1 sess.; 65th cong., 2 sess.; 66th cong., 1 sess.

<sup>78</sup> 66th cong., 2 sess., 4567.

<sup>79</sup> 67th cong., 4 sess., H. J. Res. 436.

<sup>80</sup> 68th cong., 1 sess., 3874.



interpreting organ in the central government." They clearly show that any final arbiter which was a branch of the central government was reprehensible to a considerable body of the American people. The Supreme Court was an object of attack in these discussions, for the answers to the "Resolutions" by the loyal states placed the interpreting power over matters of national import in the Supreme Court.

The Kentucky Resolutions read in part as follows:<sup>81</sup>

"That the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion and not the Constitution the measure of its powers; but that, as in parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of mode and measure of redress."

The Virginia Legislature adopted resolutions, if less radical, just as firm:<sup>82</sup>

"That the acts (Alien and Sedition) aforesaid are unconstitutional and that the necessary and proper measures will be taken by each (state) for co-operating with this State in maintaining unimpaired the authorities, rights, and liberties reserved to the states respectively or to the people."

These resolutions were not drawn against any decision of the Supreme Court, but they were directed against the supremacy of the federal government and its chief interpreting organ, the Supreme Court. However, it is apparent from the reception which was accorded to them that they were taken as attacking the power of the Supreme Court, for legislature after legislature replied that to the "supreme judiciary" was committed "the authority of ultimately and conclusively" deciding upon the constitutionality of legislative acts.<sup>83</sup> This is shown by Haines who says:<sup>84</sup>

"As the legislatures of the states, so soon after the establishment of the government under the federal constitution came out so unanimously and unequivocally in favor of the view that the Supreme Court of the United States was vested with the full and ultimate authority to determine the validity of legislative acts of Congress, it appears useless to claim that the national court usurped authority."

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<sup>81</sup> *Works of Thomas Jefferson*, vol. 8, 459.

<sup>82</sup> C. G. Haines, *Conflict over Judicial Powers in the United States to 1870*, 57.

<sup>83</sup> Haines, *op. cit.*, 57-58.

<sup>84</sup> *Ibid*, 58.

Proposals to deny the power of judicial review came early in the history of Congress. As early as 1805 Mr. Breckenridge of Kentucky proposed an amendment to the Constitution which would have withdrawn from the purview of the Supreme Court suits in which a state was a party in certain instances.<sup>85</sup> And in 1806 Senator Maclay gave notice of a resolution of the Pennsylvania legislature calling for a constitutional amendment which would define the jurisdiction of the Supreme Court as follows:<sup>86</sup>

"The judicial power of the United States shall not be construed to extend to controversies between a state and the citizen of another state; between citizens of the same state claiming land under grants of different states; and between a state or citizens thereof, and foreign states, citizens, or subjects."

Jefferson's bitter antagonism against the Supreme Court, Chief Justice Marshall in particular, was well known, and he was very apprehensive of the "sapping and mining" of the federal system which the Supreme Court was doing. And "from the day of Marshall's appointment to the end of Jefferson's life, the sage of Monticello planned for the removal of the great judge or the essential curbing of the powers of his court."<sup>87</sup> Jefferson supported and applauded the acrid and vitriolic onslaughts of Judge Roane of Virginia on the Supreme Court, and he could not have received except with approval a proposed amendment fashioned by Judge Roane in 1821 to curb the power of the Court. His proposal read as follows:<sup>88</sup>

"That the judicial power of the United States shall not be construed to extend to any case in which a state shall be a party, except in controversies between two or more states, nor to any other controversies involving the rights of a state and to which such state shall claim to become a party. That no appeal shall be construed to lie in any court of the United States from any decision rendered in the courts of a state."

The effect of this would have been to divest the Court of all suits to which a state was a party, except between individual states, and of all appeals from the tribunals of a state in federal questions.

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<sup>85</sup> 8th cong., 2 sess., 53 (February 8, 1805).

<sup>86</sup> 9th cong., 1 sess., 68 (January 22, 1806).

<sup>87</sup> Dodd, Wm. E., "Chief Justice Marshall and Virginia," *American Historical Review*, vol. 12, 776 (July, 1907).

<sup>88</sup> *Ibid*, 786.

In 1822 other attempts were made in Congress to relieve the situation by limiting and defining the jurisdiction of the court.<sup>89</sup> In the following Congress Mr. Stephenson of Virginia introduced a resolution for the repeal of the twenty-fifth section of the judiciary act of 1789.<sup>90</sup> He remarked that he knew very well that the recent controversies which had arisen between the federal and state governments, as to their rights and powers, were of extreme "delicacy and importance." He thought that the repeal of "article twenty-five", which allowed appeals from state courts, in federal questions, to the Supreme Court, would ease the situation.

The Supreme Court had been nullifying state statutes irrespective of adverse criticism. The twenty-fifth section of the judiciary act, therefore, was the chief point of attack since it was through that section that the Court secured jurisdiction over such controversies. On April 10, 1826 Representative Holmes offered a resolution to repeal the twenty-fifth section. He said:<sup>91</sup>

"I would do it on this ground: if the parties see fit to take their remedy in a state court, and pursue that remedy to final adjudication in the highest tribunal of a state, whatever that decision should be, I say the parties ought to be bound."

When Congress convened in 1830, a fight was imminent over the curbing of the Court's power. Warren says:<sup>92</sup> "shortly after Congress convened the House of Representatives instructed its committee on judiciary to inquire into the expediency of a bill repealing section twenty-five (judiciary article) in view of the South Carolina and Georgia nullification." And Warren quotes a New York Whig paper as follows: "The court has met, with a knowledge that it will be violently assailed in the House of Representatives, and that an attempt will be made to deprive it of its constitutional right to decide on the constitutionality of state laws." This fear was not altogether unfounded, for the committee on judiciary, on February 9, 1831, reported<sup>93</sup> that "the states are by this section deprived of the right of determining their own powers, and are made subordinate to the Supreme Court of the United States," and that there was a strong

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<sup>89</sup> 17th cong., 1 sess., 113-114.

<sup>90</sup> 18th cong., 1 sess., 1682.

<sup>91</sup> 19th cong., 1 sess., 463.

<sup>92</sup> Warren, *The Supreme Court in United States History*, II, 198.

<sup>93</sup> 21st cong., 2 sess., 662.

current of distinguished opinion to the effect that the Supreme Court had no authority to declare the laws of a state unconstitutional, affirming that the duty rests with the state tribunals exclusively. These strong words were used:

"Can it be supposed by any rational man, that the framers of the Constitution ever contemplated an encroachment on the sovereignty of the states, such as would reduce them to mere petty corporations, or to perpetuate inferiority, annihilating at once every vestige of their sovereignty and independence."

The House failed to take action.

In 1858 "a renewed effort was made by the Abolitionist press and in Congress to weaken the authority of the Court by a move to repeal the twenty-fifth section of the judiciary act and to abolish the jurisdiction on writs of error to state courts," says Warren. Bills to that effect, by Senator Pugh of Ohio, were introduced in the first session of the thirty-fifth Congress, but they were reported adversely.

Ten years later, in 1868, Congress passed a measure which actually curtailed the jurisdiction of the Supreme Court with the express purpose to prevent judicial review of Congressional legislation. An act of April 5, 1867 had provided for appeals from the United States Circuit Court to the Supreme Court in Habeas Corpus proceedings.<sup>94</sup> Up to that time the Supreme Court had had no appellate jurisdiction in such cases. But at the time it seemed that such provision would be necessary for the preservation of individual and personal liberty. Shortly afterward, November, 1867, one William McCardle, detained under military custody, secured a writ of Habeas Corpus in the United States Circuit Court of the district of Mississippi to his military custodians, and he was brought into the custody of the United States marshal, being released on bail. An appeal was taken to the Supreme Court, and, despite contention of government counsel to the contrary, that court held that it had jurisdiction under the act of 1867, and the motion of government counsel to dismiss was denied.<sup>95</sup>

Congress thereupon, by attaching a repeal clause to a more important measure, passed an act repealing so much of the act of 1867 which allowed jurisdiction to the Supreme Court in

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<sup>94</sup> *Habeas Corpus Act*, April 5, 1867.

<sup>95</sup> *Wm. H. McCardle*, 6 Wallace 318, 327.

Habeas Corpus appeals, and interdicted those cases in which appeals had already been commenced. President Johnson vetoed the measure, but Congress passed it over his veto, in the face of accusations to the effect that the bill was rushed through, appended to a necessary bill, in order to prevent the Supreme Court from deciding the *McCardle* case, the reason being the fear that the Supreme Court would declare the reconstruction laws unconstitutional.<sup>96</sup>

The Court did not come to a final decision of the case until after the passage of the repeal clause. Then Chief Justice Chase, for the Court, dismissed the appeal for want of jurisdiction, saying:<sup>97</sup>

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its powers under the Constitution, and the power to make exceptions to the appellate jurisdiction of the Court is given by express words." The Court continued:<sup>98</sup> "It is quite true, as was argued by the counsel for petitioner, that the appellate jurisdiction of this Court is not derived from acts of Congress. It is strictly speaking conferred by the Constitution. But it is conferred 'with such exceptions and under such regulations as Congress shall make.'"

It was insisted that the Court could proceed with the case since the proceedings had been commenced before the passage of the repeal acts, but the Court declared that the general rule is that an act of Congress, when repealed, must be considered as never having existed except as to transactions passed and closed. According to the rule, therefore, the Court had no jurisdiction over the appeal.<sup>99</sup> And to the contention that the court had other appellate jurisdiction than that named by Congress, the Court said of Congress:<sup>100</sup>

"They have declared affirmatively its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate powers as is not comprehended within it."

This is the only instance where the power of the Court has been effectively curtailed by the majority party in the furtherance of its own questionable policies. And if the decision of

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<sup>96</sup> 40th cong., 2 sess., 2165-67.

<sup>97</sup> *Ex parte McCardle*, 7 Wallace 506 at 514.

<sup>98</sup> *Ibid.*, 513.

<sup>99</sup> *Ibid.*, 515.

<sup>100</sup> *Ibid.*, 513.

the Court in the *McCardle* case is binding authority, there is no reason why Congress might not at any time restrict the appellate jurisdiction of the Supreme Court to prevent decisions adverse to congressional, or for that matter, state legislation.

In 1858, says Warren, a measure originating with Thaddeus Steven in the House which expressly forbade the Supreme Court to take jurisdiction in any case in law or equity arising out of the reconstruction acts was introduced by Lyman Trumbull in the Senate.<sup>101</sup> But that body took no action.<sup>102</sup>

The same Illinois Senator in the next Congress reported a bill "To define the jurisdiction of the Supreme Court in certain cases,"<sup>103</sup> but the measure in fact was designed to destroy the Court's power of judicial review. At the same time Senator Drake of Missouri<sup>104</sup> delivered a violent speech advocating a bill to provide that no court created by Congress should have power to declare invalid any act of Congress, and to prevent the Supreme Court, through its appellate jurisdiction, from affirming any such judgment of invalidity by an inferior court.

And Senator Sumner introduced a bill which purported to prevent the Supreme Court from passing upon the validity of acts of the legislature or executive. The bill, in part, provided:

"that the judicial power extends only to cases in law and equity arising under the Constitution, laws and treaties of the United States, and does not include the President or Congress, being the other departments of the government, or any of their acts, civil or political, in their official capacity, under the requirements, sanctions, and responsibilities of the Constitution; and all such acts are valid and conclusive on the matters to which they apply . . ."<sup>105</sup>

In 1908 the Socialist Party Platform advocated the abolition of the power of judicial review:<sup>106</sup>

"The abolition of the power usurped by the Supreme Court of the United States to pass upon the constitutionality of the legislation enacted by Congress. National laws to be repealed only by act of Congress or by a referendum vote of the whole people."

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<sup>101</sup> 40th cong., 2 sess., 21, 27.

<sup>102</sup> Warren, *op. cit.*, III, 193.

<sup>103</sup> 41st cong., 2 sess., 167.

<sup>104</sup> Warren, *op. cit.*, III, 214.

<sup>105</sup> 41st cong., 2 sess., 2895-96.

<sup>106</sup> Porter, *op. cit.*, 367.

The party has been consistent in advocating the change ever since.<sup>107</sup>

In the Sixty-fourth Congress proposals were made both in the House and Senate to put an end to the "constitutional powers" of the Court.<sup>108</sup> Senator Owen, speaking in favor of his joint resolution, declared that the Court had usurped the power to declare measures unconstitutional, and that the early fathers voted against any such plan. His proposal therefore was to secure a constitutional amendment as follows:<sup>109</sup>

"That from and after the passage of this act federal judges are forbidden to declare any act of Congress unconstitutional. Any judge who declares any act passed by the Congress of the United States to be unconstitutional is hereby declared to be guilty of judicial usurpation and guilty of violating the Constitutional requirement of good behavior upon which his tenure of office rests, and shall be held by such decision to have vacated his office."

In the Sixty-fifth Congress a joint resolution and a bill were introduced, both of which had as their object the limitation of the right of the Supreme Court to declare acts unconstitutional.<sup>110</sup>

And the proponents of the child labor law of 1918 sought to prevent the possible review of that law by the Supreme Court, which the Court did finally review and declare unconstitutional.<sup>111</sup> Senator Owen had a plan whereby this possibility could be avoided.<sup>112</sup> The following quotation will show his plan:

"This can be done under the Constitution in the manner which I have proposed by forbidding the judges of inferior federal courts to question the constitutionality of an act when Congress has declared it constitutional, and removing the appellate power from the Supreme Court to pass on this constitutionality. In this way, there would be no conflict between the Congress and the Supreme Court. There ought to be none. The bodies exercising the power of this great republic ought to act along lines of perfect harmony, not along lines of conflict. The people ought to know what the law is when Congress has spoken and not wait twenty years to have it declared unconstitutional by a changing Court."

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<sup>107</sup> See Porter, *op. cit.*

<sup>108</sup> 64th cong., 2 sess., S. J. Res. 196; H. J. Res. 361.

<sup>109</sup> 64th cong., 2 sess., 1068.

<sup>110</sup> 65th cong., 2 sess., H. J. Res. 39; H. R. 12415.

<sup>111</sup> 65th cong., 2 sess., 7433.

<sup>112</sup> This was previous to the decision in *Hammer v. Dagenhart*, 247 U. S. 251.

This would in effect take from the lower courts the power to pass upon questions of constitutionality, and at the same time prevent appeals to the Supreme Court on the constitutionality of such legislation. The passage of the act would have been presumptive evidence of its validity. And in the House Representative Landon of New York spoke against the recurrence of such decisions as that in the Child Labor Case thereby stopping the enactment of measures for the social and industrial welfare by national legislation. He said:<sup>113</sup>

"That every law should be accompanied by the statement that the Supreme Court shall have no power to declare it unconstitutional. Another remedy proposed is that the Supreme Court, which has appellate jurisdiction, shall be deprived of the opportunity to have matters involving the constitutionality of federal statutes brought up before them on appeal."

Again in 1923 Senator Owen introduced a bill to limit the Court's power of judicial review:<sup>114</sup>

"That from and after the passage of this act federal judges are forbidden to declare any act of Congress unconstitutional. No appeal shall be permitted in any case in which the constitutionality of an act of Congress is challenged, the passage by Congress of an act being deemed conclusive presumption of the constitutionality of such act."

An unofficial proposal was advocated by Jackson Harvey Ralston. He would by a constitutional amendment deprive the Supreme Court of its power to declare void or refuse to enforce any act of Congress whatever.<sup>115</sup>

### Summary.

Appeals from decisions of the Supreme Court in the case of constitutional questions have been proposed to *ad hoc* and permanent bodies and also to Congress as a whole. The pre-constitution proposals, in the case of the recommendations of Massachusetts and New York, provided for appeals to an *ad hoc* commission to be appointed by the President with the advice and consent of the Senate.

In 1821 a proposal was made to provide an appeal to the Senate in any case in which any state might be a party or desired to become a party by virtue of its constitution or laws be-

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<sup>113</sup> 65th cong., 2 sess., 7692.

<sup>114</sup> 67th cong., 4 sess., 2416.

<sup>115</sup> *Forum*, vol. 71, 567-70.



ing questioned. A similar proposal was made in the same Congress. In 1826 it was again suggested that the Senate be given appellate jurisdiction. All of these proposals were obviously made to protect the states from the growing power of the Supreme Court.

In 1867 Davis of Kentucky proposed that all cases of a constitutional character under the national government and all questions of a conflict of jurisdiction between it and state governments should be decided by a permanent tribunal composed of one member from each state, thereby divesting the Supreme Court and the federal judiciary of all of this jurisdiction.

A different and more restricted proposal was made by Senator La Follette in 1922. It was directed against the nullification of acts of Congress and provided that Congress might reverse adverse decisions of the Supreme Court by a repassage of such measure. Proposals of a like nature were made later, one of them requiring a two-thirds vote of Congress to overrule the decision.

The proposals to require an extraordinary number of judges to concur in holding laws unconstitutional fall into three classes: In regard to state laws alone, both state and national laws and national laws alone.

The first proposal of this character came in 1823 when it was proposed that seven judges, all of the then existing court, concur in decisions adverse to state and congressional legislation. The next year Senator Van Buren sponsored a proposal that five of the seven judges of the Supreme Court concur in decisions adverse to state laws. And a measure was advocated that would have required a majority of a quorum of the Court to be also a majority of the Court. Another proposal was to the effect that no state law should be held unconstitutional without the concurrence of two-thirds of the judges of the Court.

In 1826 there was a bill before Congress to increase the membership of the Court to ten, and to this an amendment was offered which provided that seven of the ten judges should concur in decisions holding both national and state laws invalid. Another amendment provided for the concurrence of six of the ten justices.

In the Reconstruction days Congress, in order to prevent radical legislation from being invalidated by the Court, received a proposal to require two-thirds of the justices to concur in decisions holding congressional legislation unconstitutional. In 1868 a bill was introduced which provided that the concurrence

of all of the justices be required in holding both state and Congressional legislation unconstitutional.

In 1896 a proposal of the above character was made in regard to Congressional legislation alone. Then in recent years various men have proposed that seven justices or a number equalling two-thirds of the membership of the Court concur in holding acts of Congress unconstitutional.

The movement to control the Court and make its decisions more amenable to the popular will has been also in the direction of congressional recall and popular election. The first attempt of this nature came in 1805 when it was proposed that the judges of all federal courts be made removable by the President upon joint address of both houses of Congress. These proposals were made repeatedly for more than a quarter of a century afterward. The majority required in Congress to procure removal varied, but the central idea prevailed throughout. As early as 1822 a proposal was made to elect the federal judiciary. A series of like measures were brought forward in the 1840's and during the Reconstruction period. Efforts have been made ever since to secure popular election and congressional recall. In 1908 the Socialist and Independence parties advocated popular election. Senator La Follette was also a staunch advocate of popular election.

The proposals to deny the power of judicial review to the Court have had as their object protection of state laws, congressional legislation and both. The tone of the Kentucky and Virginia Resolutions was distinctly adverse to the power, and proposals were soon made in Congress to prevent its application to certain cases involving the rights of states. Another mode of attack was the attempt to prevent appeals from state court to the Supreme Court of the United States. This called for the repeal of Article 25 of the judiciary act. Then there is the actual possibility that Congress will take away some of the Supreme Court's appellate jurisdiction and thereby curtail its power as was actually done in the *McCardle* Case.

The Reconstruction period also saw efforts to deny the Court power to pass upon the constitutionality of the Reconstruction Acts and to even practically do away with that function of the Court. The Socialist Party in 1908, and ever since, has advocated the denial of the power of the Supreme Court to declare laws unconstitutional. With them agrees Senator Owen who has proposed that federal judges be denied that power and be subject to removal if they attempt to exercise it.

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